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FEDERAL COURT JUDGMENT LIENS

TERRITORIAL EXTENT

Apparently, at the present time, the thought of lawyers on the law relating to the territorial extent of Federal Court judgment liens on real property in the states, is somewhat confused. To attribute the bewilderment to any inherent difficulty in the subject would be ungracious if not unjust. It would be fairer to ascribe it to the distractions of modern life and business, though doubtless some modicum of blame is due to that propensity so gloomily pondered by Sir Joshua Reynolds when he said, "There is no expedient to which man will not resort to avoid the labor of thinking."

The subject is not without difficulties. The law governing such liens in a given state is the result of the reciprocal operation of the laws of two sovereignties, the United States and the state. Whenever the law on any subject is so derived, it is apt to be a little intricate and search for it uninviting, requiring more time and closer study than the busy practitioner or judge ordinarily can devote to it.

There is a proneness on the part of lawyers to accept *dicta*, both judicial and *obiter*, as pronouncements of law—a thing very easy to do. Of necessity we go to the books to learn what the law is. We like and seek to find it ready-made, clean-cut and finished. We should like, also, to find it supporting our side of a controversy or at least conforming to a preconceived notion of what the law ought to be. A *dictum* meeting these requirements is entertained with favor and is easy to accept as law.

Judicial *dicta*, of course, are entitled to some consideration, *obiter dicta*, none. In a few cases on federal court judgment liens there are *dicta* of both kinds, which are confusing and misleading unless recognized for what they are. The most outstanding example

is the much discussed case of *Rhea v. Smith*.¹ The unfortunate opinion in this case is the latest and most potent cause of perplexity. The *decision* of the case is right, but the *opinion* not only states erroneously the main question to be solved, but upon the discussion of that question reaches a wrong conclusion as the basis of the decision, disclosing only indirectly and obscurely the true reason. For an opinion in a case requiring no consideration of policy nor the exercise of discretion, but only the application of logic almost mathematical in its precision, this opinion is discouragingly inexact and vague.

The almost oracular quality attributed by the bar to whatever is said by judges makes it difficult to confute their statements on matters of law, especially those emanating in the form of reasoned opinions from the highest court in the land. But this is not a sufficient reason for withholding criticism of an erroneous *dictum* or even of an erroneous decision. Protest against the *dictum* in *Rhea v. Smith* is the more insistently called for because it is now leading hundreds of persons to waste hours daily in searching records that do not need to be searched and in abstracting records that did not need to be made, and is causing suitors in some places to do things unnecessary and in other places to omit steps necessary to the assertion and preservation of their rights under the law. It is proposed to attempt in this paper a close examination of the case, but before coming to that, to trace briefly the origin and development of the judgment lien, and then to analyze the pertinent parts of the statute that was misconstrued in the opinion, namely, the Act of Congress of August 1, 1888.²

At common law, *unmodified by statute*, a debtor's lands could not be subjected to the payment of his debts (except in favor of the king), and hence a judgment was not a lien. But in the year 1285, at the instance of merchants, who not infrequently had judgments against impecunious land owners, the statute of Westminster II (13 Edw I, c. 18) was enacted, which allowed a very limited kind of execution against land. The writ was called the writ of *elegit* (he has elected). By taking it out the creditor elected to collect his debt in a certain way, thereby waiving his right, tem-

274 U. S. 434, 71 L. ed. 1139, 47 Sup. Ct. 698 (1927), reversing 308 Mo. 422, 272 S. W. 964 (1925). To set out here the facts, issues, decision and dictum in this case would be to duplicate much that will follow in this paper. Moreover, anything like an adequate statement would be much too long to insert here. Readers not already familiar with the case may turn to one of the reports of it if they desire, but the "historical approach" presently to be essayed is the easier one and much more interesting.

25 U. S. Stat. 357 U. S. C. A., Tit. 28, Sections 812, 813 (1888).

porarily at least, to resort to other means (having the debtor thrown into jail, for example) Under this writ the sheriff seized the chattels of the debtor (except oxen and beast of the plow) and delivered them to the creditor at an appraised value.³

If the value of the seized chattels did not satisfy the judgment, or if there were no chattels, the sheriff put the creditor into possession of a moiety by partition of the debtor's land. The creditor became a tenant by elegit, entitled to hold the land until the rents, issues and profits discharged the debt.

Now, though this statute said nothing about a lien, the courts held that when a writ of elegit was delivered to the sheriff for execution, there arose a lien upon the land to the extent necessary to effectuate the purpose of the writ. (This is sometimes called an execution lien.) When it is considered that a judgment lien is not an interest in the land itself (*jus in re*) but only a right to resort to it to the exclusion of others, and that no question would arise about even the existence of such a right unless there were conflicting claims, it is readily seen that the creation of the lien by judicial construction was practically a necessity. For suppose that one of several judgment creditors took out a writ of elegit and delivered it to the sheriff, and that thereafter but before the land was seized another creditor did likewise, and then another and so on. Which creditor ought to have the best right? The one who acted first, of course, who did all that he himself *could* do to subject the debtor's land to the payment of his judgment. Here, then, was an established right to proceed against the land—a charge upon it, and that is what a lien is.

Gradually it came about, by usage, that a judgment creditor need not, in order to have a lien, actually put a writ into the hands of the sheriff for execution or even have one issued, but could simply enter on the roll his election to look to the debtor's land. Here was the germ of the judgment lien (as distinguished from the execution lien), which slowly developed through usage and judicial decisions and legislation, variously in different colonies and states, into the lien as it is known today. It was but a step from the lien under the elegit to the lien on all the debtor's land in fee when the free-

³ To some it has seemed a mystery that this statute allowed the seizure of the plow, but not the beasts; for it would seem that a landowner would be almost as hopelessly crippled without the plow as without the beasts; but while the ways of legislative bodies have always been, and of necessity always will be, to some extent inexplicable, inscrutable, yet there is, in this instance, a fairly obvious reason: a plow does not eat, a beast does; which is a good or a bad reason according to one's viewpoint.

hold in all was subjected to execution, and thence but another step to legislative recognition of the lien, and thence another to express statutory fiat. The assertion sometimes made in late years that the modern judgment lien is supported *only* by statute, is not quite true.

Early in the life of the federal courts their judgments were held to be liens whether similar state court judgments were liens by the laws of the state in which the Federal Court judgments were rendered. This resulted from the "Process Acts" of Congress (1789, 1792, 1828, 1872) and other acts, adopting for the Federal Courts the processes of the several states in which the courts were held.⁴ Though suggestions are found that the judgment lien may be considered a rule of property applicable by the Federal Courts to their own judgments under the 34th section of the Judiciary Act of 1789,⁵ this is not the generally accepted derivation of the lien.

While undoubtedly Congress has power to make Federal Court judgments liens upon land independently of state laws, it has never done so, but, pursuant to its uniform policy in matters of practice and procedure in actions at law, has adopted the laws of the states on the subject, so far as they were suitable to the organization and powers of the Federal Courts. Such adoption did not

In *Brown v. Pierce*, 7 Wall. 205, 19 L. ed. 134 (1868), it was said:

"Judgments were not liens at common law, but several of the states had passed laws to that effect before the judicial system of the United States was organized, and the decisions of this court have established the doctrine that 'Congress, in adopting the processes of the states, also adopted the modes of process prevailing at that time in the courts of the several states in respect to the lien of judgments within the limits of their respective jurisdictions. *Williams v. Benedict*, 8 How 111, *Ward v. Chamberlain*, 2 Black, 438 (67 U. S. XVII, 324) *Bayard v. Lombard*, 9 How. 530; *Riggs v. Johnson Co.*, 6 Wall. 166 (73 U. S. XVIII, 768)"

"Different regulations, however, prevailed in different states, and in some neither a judgment nor a decree for the payment of money except in cases of attachment or *mesne* process, created any preference in favor of the creditor until the execution was issued and had been levied on the land. Where the lien is recognized, it confers a right to levy on the land to the exclusion of other adverse interests acquired subsequently to the judgment; but the lien constitutes no property or right in the land itself. *Conard v. Atlantic Ins. Co.*, 1 Pet. 413. *Massingill v. Downs*, 7 How 767."

The early reported cases are reviewed, with some reference to unreported decisions, in an auditor's report in the case of *Bayard v. Lombard*. 9 How 530, 13 L. ed. 245 (1850) which is set out in full because "it examines a point of great interest to the profession throughout the United States."

A note in 47 L. R. A. 469 cites practically all cases up to 1899. In "Notes to Decisions" under Section 812, Tit. 28, U. S. C. A., all other pertinent cases to date may be found.

⁴ 1 U. S. Stat. 92, R. S. 721, U. S. C. A., Tit. 28, Sec. 725.

have the effect of conferring upon the states any power whatever to legislate about Federal Court judgment liens, to control or regulate them in any way, it simply gave to state laws, so far as they were suitable and adaptable, the force of federal law. All questions concerning such liens—their existence, duration, effect, territorial extent and other incidents—were federal questions ultimately determinable by the Federal Courts.

A doubt having arisen whether in the adoption of state processes the state laws relating to the duration of judgment liens were embraced, Congress passed, on July 4, 1840, what became Sec. 967 R. S., U. S. C. A. Tit. 28, Sec. 814, reading as follows.

“Judgments and decrees rendered in a District Court, within any state, shall cease to be liens on real estate or chattels real, in the same manner and at like periods as judgments and decrees of the courts of such state cease, by law, to be liens thereon.”

This was the first act of Congress expressly mentioning liens of judgments in the Federal Courts, although there had been tacit recognition of such liens in the Act of May 19, 1828,” relating to stay of execution.

There remained one troublesome difference between the liens of State Court judgments and those of Federal Court judgments, namely, the difference in territorial extent.

In states where judgments were liens at all (which was in the most of them), the lien usually was restricted territorially to the limits of the jurisdiction of the court that rendered the judgment, ordinarily a county. No such restriction applied to Federal Court judgments, but such a judgment was a lien throughout the state in which the court was held, even though there were two or more Federal Court districts in the state. That the lien should extend throughout the federal *district* was easy enough to arrive at, for state law having in view *counties* as jurisdictional units of territory would necessarily, when adapted to the federal judicial system, have to be regarded as contemplating *districts* as jurisdictional units. State law adopted by Congress for application to federal subjects becomes federal law, and in its minor parts must be modified to suit the new subject in a rational way.

But the holding that in a state where there were two or more federal districts a judgment in one of them operated as a lien not

⁴ 4 U. S. Stat. 281, c. 68, Sec. 2, R. S. 988, U. S. C. A., Tit. 28, Sec. 841.

only there but everywhere else in the state, was not so easily reached. Under R. S. Sec. 985, derived from the Act of May 20, 1826, c. 124,⁷ "All writs of execution upon judgments or decrees obtained in a District Court, in any state which is divided into two or more districts, may run and be executed in any part of such state, but shall be issued from, and made returnable to, the court wherein the judgment was obtained." Hence, state processes on a judgment, adopted as the processes of a Federal Court, became, by adaptation, state-wide instead of district-wide. And therefore, since it was because of the creditor's right to final process that his judgment became a lien at all or to any extent, it necessarily followed that the lien was state-wide. Only two cases have been found on this point *The Manhattan Co. v. Evertson*,⁸ and *Prevost v. Gorrell*,⁹ but they are soundly reasoned and no case has been found that contradicts them.¹⁰ Assertions that the lien of the judgment is co-extensive with the district have all been made in cases where the properties sought to be charged were within the *districts* but not within the *counties* where the judgments were rendered. Congress, in the Act of August 1, 1888,¹¹ tacitly recognized the rule that a Federal Court judgment, at that date and prior, was a lien throughout the state, whether the state constituted one or two or more federal court districts. Some rather grotesque questions would arise if that recognition were not implicit in the act.

In many, if not all of the states where judgments were liens upon land but only, in the first instance, within the county where rendered, there came to be enacted statutes providing for the extension of the lien to any other county in the state by some filing, registering, recording, docketing, indexing or the like of a transcript or abstract of the judgment or of the journal or docket entry thereof, in some county office such as that of the clerk of a court or the recorder of instruments affecting real property. Such statutes, before the Act of August 1, 1888, were not adopted by Congress or by Federal Courts under authority of Congress so as to be applicable to Federal Court judgments. The most of them, moreover, did not mention or by terms include Federal Court judgments and hence imposed upon local state officers no duty to perform as to such judgments the services required as to judgments of the State Courts. The few of them that did purport to affect Federal Court

⁷ 4 U. S. Stat. 184, U. S. C. A., Tit. 28, Sec. 838.

⁸ 6 Paige 457, 466 (1837).

⁹ 5 W. N. C. 151, Fed. Cas. No. 11, 400 (1877)

¹⁰ See 14 Cent. L. J. 304.

¹¹ Note 2, *supra*.

judgments were inoperative in that respect because they were not adopted as federal law and the states were utterly without power to control the effect or operation of judgments of the Federal Courts.

Congress did not have power, and has never attempted, to authorize or require state officers to perform any service in respect of judgments of the Federal Courts. To confer power or impose duties upon state officers is exclusively a state function, the exercise of which, however, in respect of anything to be done about Federal Court judgments, was unavailing until Congress, by reciprocal legislation, had authorized the employment of the services to the effect intended. If, therefore, prior to August 1, 1888, in a state whose statutes authorized the transcribing of Federal Court judgments, a state officer had performed the required service in respect of such a judgment, his act would have been as nothing, wholly ineffective in law, for it was not *federal* law that the thing done *should* have any effect.

The rule, then, that judgments of the Federal Courts operated as liens throughout the states where the courts respectively were held, continued to be applied notwithstanding state statutes regulating the territorial operation of State Court judgments as liens. The consequent unsatisfactory situation was well described by Judge Caldwell in *Dartmouth Savings Bank v. Bates*,¹² in these words.

“This rule resulted in giving suitors in the Federal Courts a preference over those in the State Courts as to the territorial extent of the lien, and worked a hardship on the citizens generally. The mass of the people relied confidently on the records in the clerk’s office of their county disclosing all judgments that were liens on property in the county. Most people were ignorant of the all-pervading lien of a judgment in a Federal Court, and they bought and sold lands on the faith of what the county records disclosed. The result was that cases of great hardship occurred. Persons who bought and paid for lands on the faith that the records in the county clerk’s office showed the condition of the land with reference to judgment liens thereon, afterwards lost their lands by reason of the liens of judgments in Federal Courts held in some other county, and often at a distance of hundreds of miles from the county in which the lands lay. To correct these hardships, and to put the suitors in the State and Federal Courts on an equal footing in respect of the territorial extent of the liens of judgments in the two jurisdictions,

¹² 44 Fed. 546, 549 (1890).

in so far as Congress could do it, the Act of August 1, 1888 (25 U. S. St. 357) was passed."¹³

Section 1 of the Act of August 1, 1888, is the only part that need now be studied. It reads as follows

"Judgments and decrees rendered in a District Court of the United States within any state, shall be liens on property throughout such state in the same manner and to the same extent and under the same conditions only as if such judgments and decrees had been rendered by a court of general jurisdiction of such state *Provided*, That whenever the laws of any state require a judgment or decree of state court to be registered, recorded, docketed, indexed, or any other thing to be done, in a particular manner, or in a certain office or county, or parish in the State of Louisiana, before a lien shall attach, this act shall be applicable therein whenever and only whenever the laws of such state shall authorize the judgments and decrees of the United States courts to be registered, recorded, docketed, indexed, or otherwise conformed to the rules and requirements relating to the judgments and decrees of the courts of the state."

The enacting part of this section (down to the proviso) does not say that Federal Court judgments shall be liens, but that they shall be liens "*only as if*" they were State Court judgments. Not two assertions, but only one is made. Grammatically and logically there

¹³ That the purpose of this act as thus stated by Judge Caldwell was actually the purpose contemplated by Congress when the bill was under consideration, is abundantly proved by the report of the house committee on the judiciary and the ensuing debate in the house. (Cong. Record, V 19, pt. 3, 50th Cong., 1st sess., p. 2359 et seq.) The original bill (H. R. 8180) was introduced by the committee as a substitute for four similar bills then pending before it (H. R. 1378, 1388, 1869 and 5626) During the debate it appeared that other similar bills had been before the 48th and 49th Congresses. So it is apparent that the matter was, and had been for some time, deemed to be of considerable importance and some urgency. The bill was modified somewhat during the debate in the house, but as finally passed there it was accepted by the supporters of the bill as effecting the result intended by the committee's bill. Further amendments were made in the senate at the instance of its committee on the judiciary without debate of any importance. The house concurred only after conference. One senate amendment was the insertion in the first section of the words "*throughout such state*," and another was the insertion of the word "*only*" after the word "*conditions*." It is reasonable to believe, therefore, that the effect of these words upon the meaning of the act received especial consideration.

Nowhere in the congressional proceedings or debates was there any intimation that states were to be authorized to regulate the operation of Federal Court judgments as liens or to "conform" any such regulations to those applicable to State Court judgments. The only "conforming" mentioned was that which would be effected by the very bill itself if enacted.

is one sentence, not two, and that *one* is *simple*, not compound. The single assertion is that judgments "shall be liens." "only as if," etc. Not the creation of liens but the imposition of restrictions and conditions upon liens is the effect of this single assertion. It already was law that Federal Court judgments unconditionally and unrestrictedly were liens throughout a state whose own court judgments were liens in any manner or to any extent or under any condition at all. That would be law if this act had not been passed or should now be repealed, and is law now in those states where by reason of the proviso the act does not apply. That such was and is the law is tacitly but very plainly recognized not only by the enacting clause but by the section as a whole. Congress simply took the law as it was and imposed state restrictions and conditions upon it save in those states that should not see fit to make it possible to impose them.

The proviso withholds application of the act in any state where it would not be possible to apply the local rules. The condition under which the proviso applies at all is that there exist state laws requiring "a judgment or decree of a state court to be registered, recorded, docketed, indexed, or any other thing to be done, in a particular manner, or in a certain office or county before lien shall attach." If such laws exist, the *proviso* applies, and the condition that must then exist to let the *act* apply is that the state shall "authorize the judgments and decrees of the United States courts to be registered, recorded, docketed, indexed," or otherwise dealt with as the state laws require for State Court judgments. In other words, where the proviso applies there must be found, in order that the *act* may conform the treatment of Federal Court judgments to that required for State Court judgments, adequate authority in local state officers to perform for Federal Court judgments the requisite clerical services.

This act confers upon the states no power whatever to enact anything *regulating* Federal Court judgments, nor does it purport to do so. No such intent is expressed, and any possible vague implication to that effect in the last clause of the proviso, if not rebutted by the fact that Congress could not constitutionally delegate any such power, is nullified by a consideration of what was sought to be accomplished. Congress could not completely conform federal regulations to state regulations unless local state officers were vested with authority (implying, of course, the correlative duty) to perform as to Federal Court judgments the same services required of them as to court judgments. The states could grant this

authority, Congress could not. The states could have granted it without any action by Congress, but the services performed would have been futile without reciprocal action by Congress giving them some effect. The Act of August 1, 1888, is simply that reciprocal action.¹⁴

In some states requiring the transcribing of State Court judgments, the statutes name Federal Courts along with State Courts whose judgments are affected, and in others there are separate statutes or sections of the same nature purporting to prescribe regulations for Federal Court judgments only. Such arrogation of power began, as noticed above, before the passage of the Act of August 1, 1888, the result probably of a laudable but ill-advised and mis-directed effort to bring about conformity as between Federal and State Court judgment liens. These deceptive examples were, apparently, just blindly followed, after the passage of that act, without adequate study of the subject. Such provisions are wholly inoperative upon Federal Court judgments and are to be entirely ignored,

¹⁴ Judge Caldwell, in *Dartmouth Savings Bank v. Bates*, note 12, *supra*, explains the situation thus:

"But the power of Congress was not adequate to the task of extending the territorial operation of a judgment lien in the mode provided by state laws for a judgment in the State Court. Congress was confronted with the difficulty pointed out by Mr. Justice McLean,—the law of a state might provide for filing and docketing a transcript of a judgment of a State Court in the clerk's office of any county in the state, and in this way extend the lien of a judgment beyond the county in which it was rendered. But there was no federal clerk's office, or other like office, in each county in the state in which a judgment rendered in a Federal Court could be docketed, and Congress could not make it obligatory on the state clerks to docket and enter a judgment of a Federal Court on their records. But it was entirely competent for the state to require her clerks to perform this service, and the proviso in Section 1 of the act declares, in legal effect, that when the laws of a state provide for docketing in her clerk's offices, or other offices, the judgments of Federal Courts, in the same manner that judgments in her own courts may be docketed, then, and not before, the territorial extent (in other respects they were already the same) of the lien of a judgment in a Federal Court in that state shall be the same as that of a judgment in the State Court."

Judge Caldwell had already quoted Justice McLean as follows:

"The law of the state, which extends the lien of a judgment of a Circuit Court of the state to any county within which the record of such judgment shall be recorded, can have no application to this court. We have no right under it to require our judgments to be recorded by any clerk of the State Court. If it shall be deemed important to have the records of the judgments of this court recorded in the county where the lands of the defendant are situated, it may be required by act of Congress, or by a rule of this court, if the law of the state shall require the clerks to make such record." *Den v. Jones*, 2 McLean 83, 85.

except in so far only as they may impliedly confer authority upon local state officials to perform the services necessary to effect the transcribing of Federal Court judgments. Usually, however, it is not necessary to find the authority thus indirectly conferred, for in most such cases the statutes elsewhere expressly grant the authority or impose the duty, or at least imply it more directly.¹⁵ The legislatures of only four or five of the thirty-four states that have enacted anything concerning Federal Court judgment liens have exercised the degree of restraint that ought to characterize the attitude of one sovereignty toward the instrumentalities of another, by confining themselves simply to authorizing their local officers, in effect, to treat Federal Court judgments just as they would State Court judgments.¹⁶

¹⁵ For example, in the State of Washington, in Chapter 60, Laws of 1929, Federal District Courts are mentioned in Sections 1 and 2, where regulations are prescribed for both State and Federal Court judgment liens. From these provisions, which contemplate the filing with county clerks (who are ex-officio clerks of the Superior Court for their respective counties) of abstracts of judgments of the Federal Courts, there might, and if expedient and necessary would, be deduced an implied grant of authority to accept such abstracts for filing and otherwise treat them as if they came from State Courts. But this is not necessary, because Section 4 more directly implies a grant of authority to accept such abstracts for filing and expressly imposes the duty to docket and index them, thus: "It shall be the duty of the county clerk to *enter in his execution docket* any duly certified abstract of *any judgment of any court mentioned in this act*, filed in his office, and to *index* the same in the same manner as judgments originally rendered in the Superior Court for the county of which he is clerk." (Italics supplied.) Federal Courts being mentioned in the act, the duty thus imposed upon clerks extends to their judgments.

Since county clerks are thus charged with the duty to accept, docket and index abstracts of judgments of the Federal Courts for the state, just as if the judgments were rendered by the Superior Courts of the state, the Act of Congress of August 1, 1888, is applicable in the State of Washington; and a Federal Court judgment rendered in the state becomes, at the moment of its entry, a lien on land in the county in which it was rendered, but not in any other county without the filing of an abstract of the judgment with the county clerk of the other county.

¹⁶ Some of these enactments are so simple, and yet so adequate, that they merit attention as models:

Illinois, Sec. 81, Ch. 77, Ill. Rev. Stat. (Cahill's 1925) "Judgments and decrees of courts of the United States held within this state, and all writs, returns, certificates of the levy of a writ, and records of said courts, may be registered, recorded, docketed, indexed or otherwise dealt with in the public offices of this state, so as to make them conform to the rules and requirements relating to judgments and decrees of courts of this state."

Maryland: Sec. 28, Art. 17, Ann. Code of Maryland (Bagby 1924) directs the several court clerks to "register, record, docket and index all judgments and decrees of the courts of the United States in the same manner and at like charges as judgments and decrees of the state courts are by them registered, recorded, docketed and indexed."

Texas: Art. 5451, Vernon's Ann. Texas Civ. Stat. 1925: "An abstract of a judgment rendered in this state by any United States court may be recorded and indexed in the same manner and with like force and effect as

Missouri, where *Rhea v. Smith* arose, had made judgments extensible by transcribing, and was one of those states that had presumed to give specific statutory directions as to how and when and to what extent Federal Court judgments should become liens on land. This was attempted by naming United States Courts along with the State Supreme Court and the two courts of appeals, in two sections of the statutes applicable only to them (1554 and 1583)¹⁸ One section (1554) declared that judgments of these Appellate Courts and of Federal Courts should be liens "upon the filing of a transcript thereof in the office of the clerk of any Circuit Court," upon the debtors' lands in the county in which the filing was done. (Circuit Courts were the state's first instance courts of general jurisdiction, and there was a clerk's office in each county) The other section (1583) enacted "That judgments or decrees of the Supreme Court or either Court of Appeals or of any United States Court shall, as soon as they are filed in the office of the clerk of the Circuit Court . . . be entered in the said docket." (The keeping of an alphabetical judgment docket by each clerk was provided for in the three preceding sections.) Thus undoubtedly the Circuit Court clerks had authority and were charged with the duty to receive and docket transcripts of judgments of the Federal Courts, which met precisely and completely the condition upon which the Act of Congress of August 1, 1888, should apply in the state, namely, that "the laws of such state shall authorize the judgments and decrees of the United States Courts to be docketed" (last clause of Section 1)

The courts of record of Missouri (ignoring criminal and municipal courts) were the Supreme Court, the two Courts of Appeal (intermediate), the Circuit Courts, the County Courts, and the Probate Courts, any of which might render pecuniary judgments or decrees, though the Circuit Courts were the only courts of first instance of general jurisdiction. Judgments of the Appellate Courts

provided for judgments of the courts of this state, upon the certificates of the clerks of such United States courts."

Wisconsin: Sec. 270, 81, Wis. Stat. (1925) "The several clerks of the Circuit Courts shall docket and index the judgments and decrees of the courts of the United States in the same manner as the judgments of the courts of this state may be docketed and indexed, but in separate volumes, upon the receipt of copies of such judgments and decrees, duly certified by the clerk of the court in which they were rendered, and upon payment of fees allowed by law for like services."

¹⁷ Note 1, *supra*.

¹⁸ Secs. 1554 to 1556, 1580 to 1583, 1593, 2850 and 2851, Mo. R. S. 1919, contained all the statute law of Missouri relating to judgment liens at the time of that case.

became liens only upon transcribing,¹⁹ as did also judgments of justices courts.²⁰ A judgment of any other court of record (i. e., Circuit, County and Probate) became a lien from the time of rendition, upon lands in the county where rendered, without any transcribing or the doing of any other thing.²¹ To make such a judgment a lien in any other county a transcript had to be filed with the clerk of the Circuit Court of that county.²²

The facts in *Rhea v. Smith*, were such that, if a certain judgment in Rhea's favor against Smith's grantor, rendered January 10, 1921, by the District Court of the United States for the Southern Division of the Western District of Missouri at Joplin in Jasper County, was a lien on the debtor's land in that same county from the date of rendition, without the filing of a transcript of the judgment with the clerk of the Circuit Court of the county, then Rhea was entitled to recover, otherwise he was not. The case was brought in the Circuit Court of Jasper County, where judgment was for the defendant, Smith. On appeal this judgment was affirmed by the Supreme Court of Missouri, en banc,²³ Judges Blair and Atwood dissenting. On appeal thence to the United States Supreme Court, the judgment was reversed without dissent.²⁴ Chief Justice Taft wrote the opinion.

That this *decision* was correct is perfectly plain. The Act of August 1, 1888, was applicable in Missouri because by state law the Circuit Court clerks were authorized and obliged to receive and docket Federal Court judgments just as if they were State Court judgments. The act being applicable, it imposed upon Federal Court judgments, *not* the limitations Missouri attempted to impose upon them, but the rules she prescribed for the operation of judgments of her *own* courts. That is what Section 1 of the act says and *all* that it says "Judgments rendered in a court of the United States within any state, shall be liens *only as if* such judgments had been rendered by a court of general jurisdiction of such state." If Rhea's judgment had been rendered by the State Circuit Court in Jasper County, what more would the state law have required him to do to make it a lien on the debtor's land in that same county? Nothing. Hence his judgment rendered by the Federal Court in Jasper County became a lien on that land upon

¹⁹ Sec. 1554, Mo. R. S. 1919.

²⁰ Secs. 2850 and 2851, Mo. R. S. 1919.

²¹ Secs. 1555 and 1556, Mo. R. S. 1919.

²² Sec. 1593, Mo. R. S. 1919.

²³ *Rhea v. Smith*, 308 Mo. 422, 272 S. W. 964 (1925).

²⁴ *Rhea v. Smith*, 274 U. S. 434, 47 Sup. Ct. 698, 71 L. ed. 1139 (1927).

rendition, without the doing of anything else. By force of the act of Congress the same state law that would have been applied to a Circuit Court judgment was applicable to the Federal Court judgment.

In the opinion delivered in the United States Supreme Court, Chief Justice Taft put the following as the main question in the case "It turns on the question whether the law of Missouri *providing for the registration, recording, docketing, and indexing of judgments of the United States court for the purpose of making them liens* upon land in that state, conforms to the provisions of the state law upon the same subject in reference to liens of judgments of the courts of record of the state." (Italics supplied.) The meaning here of the italicized words, "*providing for the registration, etc.,*" is not their literal meaning, which would render the whole question quite pointless, but it is the meaning indicated well along in the opinion where it is said that Congress, by the first section of the Act of August 1, 1888, intended to limit the then existing rule, "but intended to do this only in those states which *passed laws making the conditions of creation, scope and territorial application of the liens of Federal Court judgments* the same as State Court judgments." (Italics supplied.) So that, to paraphrase the statement of the question in skeletal form, the Chief Justice's meaning was this "The case turns on the question whether the law of Missouri governing Federal Court judgment liens conforms to the state law governing the liens of State Court judgments."

The question necessarily assumes that a state has power to regulate Federal Court judgment liens. But this power, by the last clause of Section 8 of Article I of the Federal Constitution, is vested in Congress,²⁵ and it is a cardinal principle of our constitutional law that a legislative body cannot delegate power to make laws. Furthermore, as has already been said, Congress has not delegated to the states any power over liens of Federal Court judgments. By Section 6, c. 255, Act of June 1, 1872²⁶ Congress adopted state process laws then in effect and empowered the Federal Courts to adopt such as might be enacted thereafter, and by the Act of August 1, 1888, Congress adopted conditionally state laws regulating liens of judgments of *their own courts*, but it has never attempted

²⁵ *Wayman v. Southard* (Ky. 1825) 10 Wheat. 22, 6 L. ed. 253; *Abelman v. Booth* (Wis. 1859) 21 How. 521, 16 L. ed. 169.

²⁶ 17 Stat. 197, R. S. Sec. 916, U. S. C. A., Tit. 28, Sec. 727.

to *delegate to the states* power to make laws governing liens of *Federal Court judgments*.

The stated question implies that a state, in attempting to govern the liens of Federal Court judgments, must do so exactly according to a certain definite pattern, namely, the one according to which the state governs the liens of judgments of its own courts. Why should it be thought necessary or desirable that a state enact a new set of regulations as to federal judgments just like the set it already has for its own judgments? Why not simply apply the latter to federal judgments? The answer is obvious. that that is just what is done by the enacting of the first section of the act of Congress of August 1, 1888, whenever the application is possible, i. e., whenever the requisite state clerical machinery is made available to Federal Court suitors. The states have not been required or authorized or requested or even invited to effect any conformity. They have simply been offered the opportunity of making it possible for the *act of Congress* to effect conformity.

The fallacies inhering in the chief justice's conception of the dominant question in the case permeate his entire discussion and the resulting answer to the question, which is expressed in these words.

“We think that the three sections, 1555, 1556 and 1554, do not secure the needed conformity in the creation, extent and operation of the resulting liens upon land as between Federal and State Court judgments.”

From this, without noticing at all Section 1583 requiring Circuit Court clerks to docket transcripts of Federal Court judgments, and ignoring the lack of express negation in Section 1554, the opinion then expresses this conclusion.

“The lien of Federal Court judgments in Missouri therefore attaches to all lands of the judgment debtor lying in the counties within the respective jurisdictions of the two Federal District Courts in that state.”

The land in controversy being situate in the county in which the judgment was rendered, this conclusion went far beyond the necessity of the case. The precise ultimate question before the court was, Did the federal judgment rendered in Jasper County become a lien upon the debtor's land in that county *without* the filing of a transcript of the judgment with the clerk of the Circuit Court of the county? The decision was that it did, and the judgment of the

Supreme Court of Missouri was reversed. But to reach this decision did not require the holding that the judgment, upon rendition and without transcribing, became a lien throughout the district.²⁷

The briefs of counsel show that neither party contended or suggested that the Act of Congress did not apply in Missouri. The respondent *would* not, of course, because he was denying the lien. The petitioner *did* not because his counsel recognized the law to be as wrangled for in this paper. Mr. Hackney, in his brief for the petitioner, stated his first point in these words

“Under the Missouri statute, if the judgment in question had been rendered by the State Circuit Court of Jasper County, it would have been a lien on the real estate in controversy from date of rendition. Therefore, under Section 1 of the Act of Congress relating to judgment liens, the judgment of the Federal Court of Joplin was a lien on such real estate from the date of its rendition.”

His second point was stated as follows

“The Missouri legislature, while investing judgments of the State Circuit Court of Jasper County with liens on real estate in that county from date of rendition, had no power by the passage of Section 1554, R. S. No. 1919, to deprive the judgment of the Federal District Court at Joplin of any lien until a transcript thereof was filed with the clerk of the State Circuit Court.”

(His third and only other point related to the effect of the repeal of Sec. 3 of the Act of August 1, 1888, which will be noticed later.)

It is plain, therefore, that since the court, so far as appears from the record, did not have presented to it or consider any arguments for or against the “non-conformity theory” adopted in the opinion, and since the only question before the court was whether the judgment without transcribing became a lien in the county where rendered, and the decision was that it did become a lien, the opinion is authority on that question but pure *obiter dictum* on all else except the two subordinate points now about to be mentioned.

Mr. Robertson, in his brief for the respondent, argued that con-

²⁷ The territorial extent of the lien, if the Act of August 1, 1888, were not applicable would be state-wide, as was observed above, not merely district-wide. It was not necessary however, in order to decide that there was a lien in the county to hold that the act was not applicable.

formity as between Federal Court judgments and State Appellate Court judgments (as contemplated by Sections 1554 and 1583 of the state statutes) would "more nearly meet the intention of Congress and the underlying purpose thereof" than would conformity as between Federal Court judgments and those of State Circuit Courts. But the court rejected the argument, saying

"It is obvious, however, that the District Court of the United States is a court of first instance of general jurisdiction just as the Circuit Courts of the various counties in Missouri are courts of general jurisdiction of first instance. The conformity required should obtain as between them and not as between the Federal Court and the State Appellate Courts."

Omitting the word "required," which reflects the all-pervading erroneous notion that conformity is something to be created by state legislation, this is a good statement of the law as it has always been and is now whether the Act of Congress be applicable or not.

Mr. Robertson did not urge, unless by verbally adopting the majority opinion of the Supreme Court of Missouri, that any significance was to be attributed to the repeal of Section 3 of the Act of August 1, 1888. Mr. Hackney, in his brief for the petitioner, met the argument on this point made in the majority opinion of that court, and was sustained by the United States Supreme Court.²⁸

²⁸ Judge Blair, in the dissenting opinion in the Missouri Supreme Court, Judge Atwood concurring, has written the clearest brief discussion to be found on this point, and it ought to be set out in full, with the reminder that upon the repeal of Section 3 the remaining parts of the act were thereafter to be construed as if Section 3 had never been there, unless a different legislative intent is apparent.

"Respondent argues and the majority of my brethren seem to hold that the repeal by Congress in 1916 (39 Statutes at Large, 531) of Section 3 of Act of August 1, 1888, as amended in 1895, shows that it was the intention of Congress to make a Federal Court judgment a lien upon real estate in the county where the same was rendered only upon the filing of a transcript therein. Section 3, as enacted, reads as follows:

"Nothing herein shall be construed to require the docketing of a judgment or decree of a United States court or the filing of a transcript thereof, in any state office within the same county, or parish in the State of Louisiana, in which the judgment or decree is rendered in order that such judgment or decree may be a lien on any property within such county.

"In 1895 the following words were added thereto:

"If the clerk of the United States Court be required by law to have a permanent office and a judgment record open at all times for public inspection in such county or parish. (28 Statutes at Large 814.)

"The fact of such repeal furnishes respondent with a very plaus-

From all that Chief Justice Taft said of *Re Jackson Light & Traction Co.*,²⁹ it would seem that the decision in that case was right, but closer examination of the statutes of Mississippi³⁰ than evidently he made, discloses that in effect the provisions were the same as those in Missouri so far as regards either the doctrine of *Rhea v. Smith* or the correct theory. What is called "judgment docket" in the latter state is "judgment roll" in the former. To extend the lien a transcript is used in Missouri, an abstract, in Mississippi. A clerk of a Circuit Court in Mississippi is required to enter upon the judgment roll, *as a matter of course*, all judgments rendered in his court. He is allowed a certain period of time in which to do this, but when a judgment is entered it becomes a lien within the county where rendered and the lien is related back to the date of the rendition of the judgment, overreaching all intervening rights. The Circuit Court is the state court of first instance of general jurisdiction. Its clerks are authorized to file and enter on the judgment roll abstracts of judgments of the Federal Courts. In these circumstances a Federal Court judgment becomes a lien in the county of rendition without the doing of anything more, by virtue of the enacting clause of the first section of the Federal Act of August 1, 1888, and in spite of the declaration of the Missis-

ible argument that Section 1 did not originally and does not now make a Federal Court judgment a lien in the county where rendered unless a transcript thereof is filed in such county. Here I regard the argument as unsound. We are not advised of the reasons presented to Congress which actuated it in enacting Section 3 in the first place or in later repealing said section, after it had been amended. The provision that a federal court judgment should be a lien upon rendition in the county where such judgment was rendered without filing a transcript therein gave an advantage to federal judgment creditors not possessed by judgment creditors in the courts of those states which require particular steps to be taken in addition to the mere rendition of a judgment before it becomes a lien in the county where rendered, and Section 3 tended to prevent the complete harmony and conformity aimed at in Section 1. A very good and completely satisfying reason for repealing Section 3 is found in the evident purpose of Congress to put federal judgments on exactly the same footing as state judgments. The enactment of Section 3 failed to accomplish this in all cases and its repeal did effectually accomplish such purpose in all cases and in every state. It is inconceivable to me, as it is contended in respondent's brief, that, by such repeal, Congress intended that judgments of Federal Courts should not become a lien in the county where rendered unless and until a transcript thereof is filed in the circuit clerk's office, while the State Court judgment becomes a lien therein without such procedure. Such a purpose would be in hopeless conflict with the purpose expressed in section 1."

²⁹ 269 Fed. 223 (1920)

³⁰ Secs. 620 to 624, Hemingway's Ann. Code 1927.

Mississippi statute that it shall not be a lien until abstracted to the judgment roll in the office of the clerk of the Circuit Court of the county (Sec. 624). Hence, either in this view of the law or under the "non-conformity theory" of Chief Justice Taft's opinion in *Rhea v. Smith*, the decision in *Re Jackson Light & Traction Co.*, ought to have been the other way³¹

Even if the "non-conformity theory" were tenable, there was no cogent reason, certainly no clear necessity, for applying it to the statutes of Missouri, which nowhere declared that a Federal Court judgment not transcribed should *not* become a lien in the county where rendered. Section 1554 declared affirmatively that judgments of the Federal Courts and the State Appellate Courts should be liens upon transcribing to any county, and Section 1583 simply directed that transcripts from those courts be docketed as soon as filed with clerks of Circuit Courts. If there is a negation in Section 1554, it is only by implication. Judge Blair, in the dissenting opinion in the Missouri Supreme Court, found a very reasonable interpretation of this section without resorting to any such implication.³²

³¹ Mr. F. C. Hackman of the Seattle Bar pointed this out in a very thorough paper entitled "Concerning *Rhea v. Smith*," published in Vol. 22 (N.S.), p. 35, *Lawyer and Banker* reasoning on the basis of the "non-conformity theory."

³² "The majority opinion, as does respondent, lays much stress upon Section 1554 of our statute, which provides that judgments obtained in the Supreme Court, the Court of Appeals and federal trial courts shall be liens in any county in the state wherein a transcript thereof shall be filed. Apparently this section is one making provision for a lien broader in territorial application than the lien attaching upon mere rendition of the judgment. It apparently has no reference to the latter sort of lien.

"It required no action on the part of the Missouri legislature to give a lien to a judgment of the Federal District Court. That is the exclusive prerogative of Congress. Therefore, our legislature, in enacting Section 1554, undertook to do nothing more than to put Federal Court judgments upon an equality with State Court judgments by authorizing the filing of transcripts thereof in any county of the state and providing for a lien therein upon such filing."

Judge Blair, in the preceding paragraph, omitted reference to Section 1583. This apparently was an oversight, for elsewhere in the opinion he cited to this point Sections 1554 and 1583 together as enabling the transcribing of Federal Court judgments to the offices of State Circuit Court clerks, saying:

"This state has enacted legislation enabling transcripts of Federal Court judgments to be filed in the offices of the clerks of the Circuit Courts of the counties of the state and thereupon to become liens upon the real estate belonging to judgment debtors, situate therein, in the same manner as judgments of courts of one

The non-conformity idea did not have its origin in the opinion of Chief Justice Taft in *Rhea v. Smith*. The germ of it is found, of course, in the acts of state legislatures that presumed, some before and some after the Act of August 1, 1888, to enact regulations governing the creation and operation of liens of Federal Court judgments. The first judicial recognition of the idea seems to have been given by Judge Van Fleet in *Lineker v. Dillon*.³³ In this case the property sought to be charged was in a county other than that where the Federal Court judgment was rendered, and no transcripting had been done. A State Court judgment was not a lien in a county other than that where rendered until a transcript of the *original docket entry* had been filed with the recorder of the other county. The state statute that had been enacted to meet the condition requisite to the application of the Act of August 1, 1888, prescribed, in rather loose and ambiguous language, a complicated and cumbersome procedure for creating and extending liens of Federal Court judgments, but it failed to do the one simple essential thing, namely, to impose upon county recorders the duty to file *transcripts of docket entries* from the offices of clerks of the Federal Courts. The decision was that the Act of August 1, 1888, was not applicable in California at that time. Obviously this was correct, but the "non-conformity theory" was not needed in order to reach it.

The manner in which Judge Van Fleet developed the theory is shown in the following quotation from his opinion (p. 473)

"It will be observed that under the terms of the proviso the act is to have effect only in those states wherein the state law has made provision by which the mode of casting liens by judgments and decrees of the Federal Courts *shall* be 'conformed to the rules and requirements relating to the judgments and decrees of the courts of the state' in other words, until the state shall have provided—which obviously Congress did not possess the power to do—for docketing or filing abstracts of the judgments of Federal Courts in the local state or county offices in the same man-

county may be transcribed to another county. (Secs. 1554 and 1583, R. S. 1919.)"

It is a singular thing that the one and only section of the Missouri statute (Sec. 1583, Mo. R. S. 1919) that met forthright the simple condition requisite to the application of the federal act in Missouri, though it was set out in full in Mr. Robertson's brief and was elsewhere therein mentioned several times and was referred to by Judge Blair, completely escaped the notice of the United States Supreme Court.

³³275 Fed. 460, 472-475 (D. C. Cal. 1921)

ner as provided for judgments of State Courts, *and giving them like effect*, thus putting them upon an equality with the latter as a protection to suitors, the limitations of the act should not apply, but a judgment or decree of a Federal Court should continue to cast a lien co-extensive with the territorial limits of the jurisdiction of the court rendering it. And such has been the construction of the act."

In the italicized words lies the mischievous wrong idea, which would shift from Congress to the state the power to effect the desired conformity. If "shall" be changed to "may" and the other italicized words be deleted, the analysis of the proviso will be fairly clear and accurate. (The extent of the lien, if the Act of Congress should not apply, would be state-wide, however, instead of only district-wide, but this point was not involved.) Quoting from the last clause of the proviso, as Judge Van Fleet did, only the words "conformed to the rules," etc., detached from the preceding context, may momentarily lend color to the thought of an attempted delegation of power to the states to effect conformity, but a moment's reflection will dispel the idea. The several states had various kinds of procedure for creating or extending judgment liens. Registering, recording, docketing, indexing, might not include them all, so in the first clause of the proviso, the phrase "or any other thing to be done" was added as a catch-all. The corresponding catch-all in the last clause is the phrase "or otherwise conformed to the rules," etc. This is not the happiest construction that could have been devised, perhaps, yet the meaning is perfectly clear when one remembers that the only possible obstacle a Federal Court judgment creditor might meet in attempting to conform to the state law would be lack of authority in local state officials to treat his judgment as if it were a State Court judgment.

While Judge Blair in the dissenting opinion in *Rhea v. Smith* in the Missouri Supreme Court, referred to the "non-conformity theory" expressed in *Lineker v. Dillon*,³⁴ he did not adopt it, but pointed out merely (in the next to the last paragraph of the opinion) that even if the theory were adopted and applied, the respondent's case would not be helped. The paragraph in Chief Taft's opinion commencing "It is clear that Congress by the first section of the Act of August 1, 1888," is almost a paraphrase of the paragraph in Judge Blair's opinion beginning "It is apparent from reading the first section of the Act of August 1, 1888;" but there is this crucial difference whereas Judge Blair used the lan-

³⁴ Note 33, *supra*.

guage of the last clause of the proviso in that section in stating the condition under which the act would apply, Chief Justice Taft used the words "only in those states which *passed laws making the conditions of creation, scope, and territorial application of the liens of Federal Court judgments the same as State Court judgments.*" This was the slip Judge Van Fleet made in *Lincker v. Dillon*.³⁵

Probably, at present, in every state where a judgment lien is given at all there are provisions for registering, recording or the like, to be done after the entry of the judgment in order to create or extend the lien or both. *In every such case it is enough to inquire whether local state officers have authority to do for Federal Court judgments what the state law requires them to do for State Court judgments in the creation or extension of the lien.* If they have *not*, then the act of Congress does *not* apply and a Federal Court judgment becomes a state-wide lien upon rendition, but if they *have*, then the act *does* apply and whatever else the state statutes may say about Federal Court judgments is to be ignored as unauthorized and void, and such judgments are to be treated just as if rendered by State Courts.

Apparently in Kentucky, Michigan and some of the New England states there is no such thing as a judgment lien proper, though a lien attaches upon execution issued or upon levy. This situation is beyond the scope of this paper.

The only practical remedy for the confusion flowing from the opinion in *Rhea v. Smith* is a new act of Congress to take the place of the present one, *not changing the law* as it now really is and ought to remain, but expressing that law so fully and clearly that even busy lawyers and overworked judges may understand it at a glance. The bill for such an act ought not to be constructed or patched up on the floor of the House or the Senate or in a conference committee, but should be drafted as Restatements of the Law are drafted by the American Law Institute, and then be enacted in that shape or not at all.³⁶

MARION EDWARDS.*

³⁵ Note 33, *supra*.

³⁶ Mr. W. T. Stockton, of the Jacksonville (Fla.) Bar, in his excellent article on this subject published in the AMERICAN BAR ASSOCIATION JOURNAL for February 1929, intimated a hope that the present law (presumably within a reasonable time) will come to be understood by the bench and bar and state legislators, and expressed his belief that a new act would not be advisable. The writer of the present article is an optimist, too, but still doubts that the fog of misunderstanding will soon clear and logomachy cease, unless an act of the kind above suggested be passed by Congress.

*State of Washington Bar. I should like to acknowledge here that my son, William Winans Edwards, now studying at the University of Washington Law School, has given me much help and advice in the preparation of this paper. Imperfections and errors, however, are my very own.—M. E.